BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER BENEFIT DECISION NO. 6301 AS A PRECEDENT DECISION PURSUANT TO SECTION 409 OF THE UNEMPLOYMENT INSURANCE CODE.

In the Matter of:

GERALD BARNETT
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-226

FORMERLY
BENEFIT DECISION
No. 6301

S.S.A. No.

HOLLYTEX CARPET MILLS
(Employer)

Employer Account No.

The claimant appealed to a referee from a determination of the Department of Employment which held the claimant disqualified for unemployment benefits under section 1256 of the Unemployment Insurance Code for a period beginning May 22, 1966. The department also issued to the employer a ruling which held its reserve account relieved of charges under section 1032 of the code for benefits which might be paid to the claimant. After the issuance of Referee's Decision No. LE-28172, we set aside that decision and assumed jurisdiction of the matter under section 1336 of the code.

STATEMENT OF FACTS

Before filing a claim for unemployment benefits the claimant last worked as a tow-motor operator for approximately ten years ending April 15, 1966 for the employer identified above. On April 16, 1966 the claimant was arrested by police authorities on a charge of suspicion of arson and confined to jail for five weeks and two days. He was then released on [illegible]

005-05296

appeared in court on July 8, 1966, at which time, upon the advice of his attorney, he pleaded guilty to a lesser included offense and was placed on probation by the court. The claimant conceded that he had attempted to start a fire on the porch of a residence to frighten the occupant.

The claimant had been scheduled to work on April 18, 1966 but did not do so because of his confinement to jail. He notified his brother, who notified a co-worker of the claimant, who in turn notified the employer. The evidence in the record indicates that under a provision of the collective bargaining agreement between the claimant's union and his employer, the employee must notify the employer each day of his absence and is subject to discharge for failure to do so. Although the employer did not contend that the claimant failed to notify it the first day of his absence, the contention was that he was discharged for not giving further notice thereafter. The record does not reveal how long the claimant indicated he would be away from work in his indirect notice to his employer. The claimant was not permitted to make more than one call from jail. The employer's representative stated that if the claimant had reported the continued need for his absence each day, even though confined in jail, his employment would not have been terminated.

The claimant was not replaced before he returned and requested reinstatement on May 3, 1966. His duties had been performed by a foreman in the meantime. The employer refused to reinstate him when he returned.

The employer contended at the hearing that the claimant had left his most recent work voluntarily without good cause on the ground that he had voluntarily set in motion the chain of events which foreseeably led to his loss of employment in accordance with the principles expressed in Sherman/Bertram, Inc. v. California Department of Employment (1962), 202 Cal. App. 2d 733, 21 Cal. Rptr. 130.

The referee who heard the appeal held that this principle did not apply because the claimant was not replaced by the employer during the period of incarceration and the sole reason for the termination of his work was the claimant's failure to report his inability to work each day during the absence from work. This, in

the referee's opinion, "was an unreasonable demand of the employer since it knew of the claimant's confinement, and should have known the impossibility or the impracticability of him being able to call on a daily basis to report his continued absence. Therefore, under these circumstances, the referee concludes that the claimant was discharged by the employer. . ." for reasons which he found not to constitute misconduct connected with the work.

REASONS FOR DECISION

If a claimant leaves his most recent work voluntarily without good cause or is discharged for misconduct connected with his most recent work, the claimant is disqualified for benefits under section 1256 of the California Unemployment Insurance Code for a period defined in section 1260 of the code, and under sections 1030 and 1032 of the code the employer's reserve account is relieved of charges for benefits which may be paid to the claimant.

In determining whether a termination of work arose from a voluntary leaving of work or a discharge within the meaning of these sections, we held in Benefit Decision No. 6590 that a discharge occurs where the employer is the moving party in the termination and that a voluntary leaving of work occurs where the employee is the moving party.

In Benefit Decision No. 5686, we defined good cause for leaving work as a real, substantial or compelling reason of such nature as would cause a reasonably prudent person genuinely desirous of retaining employment to take similar action.

In Benefit Decision No. 5309, we held that a claimant who becomes unemployed because he is unable to continue working because of incarceration for a public offense which he has committed has thereby in effect voluntarily left his work without good cause. We said that in such a situation:

". . . While it would appear that the claimant herein may not have actually intended

> to bring about his unemployment, he did, nevertheless, voluntarily embark upon a course of conduct, the very nature of which he knew, or must be conclusively presumed to have known, would jeopardize his return to work within the allotted time. . . ."

This view was adopted and this language quoted with approval by a California district court of appeal in the Sherman/Bertram case, cited by the employer.

In Benefit Decision No. 6694, we reviewed previous cases in which we had recognized the type of distinction drawn by the referee in the present case, and we overruled them insofar as they held that this type of situation involves a discharge rather than a voluntary leaving of work. Such earlier decisions had been based on the concept that, where the employer had a reasonable choice whether or not to discharge a claimant, the immediate cause of loss of employment was the employer's choice rather than the claimant's earlier violation of law. By overruling those earlier decisions, we rejected that view.

We pointed out in Benefit Decision No. 6694 that the court had held in the Sherman/Bertram case, cited above:

> "'. . . claimant's unemployment was the result of his own fault -- his own wilful and felonious act . . . . To say that claimant's wilful criminal act was not his fault and was not the cause of his unemployment is pure sophistry. To reward claimant in such circumstances by awarding him unemployment compensation is to reward him for idleness caused by his wilful violation of the law -- and at the expense of his employer who had nothing whatever to do with it. . . .'"

Although not quoted by us there, the court had gone on to add: "This would be eminently unfair to the employer and it is also contrary to the sound public policy. '. . . if one is . . . unemployed through fault of his own, he is not entitled to benefits . . .'" and

that a claimant's ". . . 'illegal act resulting in his arrest and incarceration' . . . cannot be . . . "good cause". . . .'"

The court in that decision expressly considered two of the decisions later overruled in Benefit Decision No. 6694 which drew distinctions similar to that reflected in the referee's decision in the present case. The court rejected those decisions as establishing any valid distinction which the court was willing to recognize and concluded:

> "The true principle is whether the claimant's loss of employment was attributable to an act of his own volition and thus tantamount to a voluntary leaving."

In Benefit Decision No. 6694, we applied the principles expressed in the Sherman/Bertrum decision and held that the length of the incarceration and the promptness of replacement of the claimant by the employer are immaterial. We concluded that the claimant's unemployment arose from his own act of wilfully committing a criminal offense which foreseeably resulted in his arrest and incarceration.

In the present case, the claimant voluntarily performed an unlawful act which he must conclusively be presumed to have known would lead to his incarceration; and, if that should prevent him from performing his employment duties, to a consequent loss of employment. These events did in fact follow upon his commission of the act.

Once he was incarcerated, the claimant was unable to perform his regular employment duties, operating equipment for his employer on the next regularly scheduled duty day, and this result he must be conclusively presumed to have foreseen.

But besides operating equipment, he had another employment duty. If he was to be absent, he had, through his union, agreed to report daily on whether he would be at work that day. His violation of law and

consequent incarceration had also prevented him from performing this duty. Since this duty was an agreed term of a collective bargaining contract, and there is no evidence bearing on its reasonableness, we cannot say that it was so unreasonable that it constituted no significant part of the employment. Since its violation arose from a violation of law, we cannot say that it was with good cause.

The incarceration effectively brought the employment to an end. The lack of immediate replacement by a new employee, though emphasized in the Sherman/Bertram case, does not significantly alter this fact, where the services which the claimant was scheduled to perform were still required by the employer.

Following Benefit Decision No. 6694, and the court, therefore, we conclude that the present claimant's unemployment was essentially caused by his incarceration for violation of a law, and therefore that he left his work voluntarily without good cause within the meaning of sections 1256, 1030 and 1032 of the code.

DECISION

The determination and ruling of the department are affirmed. The claimant is disqualified under sections 1256 and 1260 of the code. Under section 1032 of the code, the employer's reserve account is relieved of charges for benefits which may have been or may be paid to the claimant.

Sacramento, California, December 2, 1966.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

GERALD F. MAHER, Chairman

LOWELL NELSON

NORMAN J. GATZERT

Pursuant to section 409 of the Unemployment Insurance Code, the above Benefit Decision No. 6801 is hereby designated as Precedent Decision No. P-B-226.

Sacramento, California, February 9, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

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HARRY K. GRABE

RICHARD H. MARRIOTT